



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat, and Water Quality"

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22 September 2008

Mr. Kenneth Landau, Asst. Executive Officer
Mr. Jim Marshall, Sr. WRCE
Ms. Gayleen Perreira, WRC Eng.
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6144

VIA: Electronic Submission
Hardcopy if Requested

Re: Comments on City of Stockton Regional Wastewater Control Facility NPDES Permit,
Order No. R5-2008-XXXX, NPDES Permit No. CA0079138

Dear Messrs. Landau and Marshall, and Ms. Perreira,

Counsel for the California Sportfishing Protection Alliance (CSPA) has reviewed the proposed Waste Discharge Requirements (Permit) for the City of Stockton Regional Wastewater Control Facility. This letter supplements the 7 September 2008 comments submitted by CSPA with new material and highlights other comments. In brief, CSPA's comments on the Permit are as follows:

1. CSPA agrees with staff's removal of language that attempted to limit the enforceability of receiving water limitations as found in the 2002 Permit.
2. The failure to include mass loading requirements from the effluent limitations for several pollutants violates the Clean Water Act's requirements to express effluent limitations in terms of mass loading.
3. The relaxing of effluent limitations found in the 2002 Permit for certain constituents, including the removal of any effluent limitation for some constituents such as oil and grease, violates the Clean Water Act's anti-backsliding provisions.
4. The Permit inappropriately creates loopholes, complicating compliance determinations and enforcement of Permit violations, including by limiting the by-pass and overflow prohibition to only those discharges that reach surface waters, and by exempting subsections IV.C, V.B, and VI.C.4.a. from the enforcement remedies available under the Clean Water Act.

I. We agree with staff's removal of qualifications regarding enforceability of receiving water limitations

CSPA supports the change from the 2002 Permit that removes ambiguity regarding what constitutes compliance with receiving water limitations imposed by the Permit. The 2002 Permit included qualifications that could be interpreted as a safe harbor from enforcement even if a receiving water limitation was violated. 2002 Permit § E. CSPA is pleased to see that this provision has not been carried over to the proposed Permit. Moreover, CSPA believes that eliminating this sort of ambiguity in the terms of the Permit will improve its enforceability, which, as explained below, will make the Permit a more effective tool in protecting water quality.

II. The failure to include mass-based effluent limitations for several pollutants violates the Clean Water Act's requirements to express effluent limitations in terms of mass loading.

As the Clean Water Act permitting authority in the Central Valley, the Regional Board must include terms in NPDES permits apply and ensure compliance with any applicable requirements of sections 301, 302, 306, 307, and 403 of the Clean Water Act. 33 U.S.C. § 1342(b)(1)(A); 40 C.F.R. § 123.25. Among the terms that must be included to ensure compliance with applicable requirements include the obligation to establish "limitations, standards or prohibitions expressed in terms of mass." 40 C.F.R. § 122.45(f).

Inexplicably, the Permit fails to include mass-based effluent limitations for several chemical constituents including aluminum, bis(2-ethylhexyl)phthalate, chlorodibromomethane, cyanide, dichlorobromomethane, manganese, molybdenum, and nitrate plus nitrite (as N). A mass-based effluent limitation can be established for each of these pollutants. In fact, the 2002 Permit included mass limits for bis(2-ethylhexyl)phthalate, chlorodibromomethane, cyanide, and dichlorobromomethane. The Regional Board must develop mass-based limits for the pollutants subject to effluent limitations in the Permit.

III. The relaxing of effluent limitations found in the 2002 Permit for certain constituents, including the removal of any effluent limitation for some constituents such as oil and grease, violates the Clean Water Act's anti-backsliding provisions

Federal and State law obligates the Regional Board to issue permits consistent with the federal requirements for NPDES permitting, including specifically the antibacksliding provisions of section 402(o) of the Clean Water Act and 40 C.F.R. 122.44. *See* 33 U.S.C. § 1342(b); 40 C.F.R. 123.25; Cal. Water Code § 13377. The Permit acknowledges that the effluent limitations for several pollutants are less stringent than those in the 2002 Permit for the same pollutants. Permit, Finding O. At least 13 pollutants have less stringent effluent limitations than those found in the 2002 Permit,¹ with the result being that most of these pollutants have no effluent limitation

¹ The turbidity effluent limitation now appears as an operational requirement. *See* Permit § VI.C.5.f. According to the Permit terms, the City of Stockton must measure the turbidity at the

at all in the proposed Permit. *Compare* 2002 Permit § B.1.a. and Permit § IV.A.1.a. As a result of this backsliding, there is now no limit on the amount of several pollutants, including copper and other materials that are highly toxic to aquatic organisms, that can be discharged from the RWCF. Such a program will not assure the protection of water quality in the San Joaquin River and the Delta.

Staff's rationale for this backsliding is inconsistent with the requirements of the Clean Water Act. For example, with respect to oil and grease, the Regional Board states that since the previous effluent limitations of 10 mg/L (monthly average) or 15 mg/L (daily max) were not exceeded since 2002, there is no reasonable potential for adverse water quality impacts from oil and grease. First, as the 7 September letter makes clear, using the 15/10 mg/L standard to judge the possibility of adverse impacts is flawed. An examination of the data compared to appropriate water quality based criteria would reveal that there is a reasonable potential for oil and grease to adversely impact water quality in the San Joaquin River. Second, the Regional Board's analyses to evaluate the reasonable potential did not take statistical variation into account as required by 40 C.F.R. § 122.44(d)(1)(ii). Third, the fact sheet itself acknowledges that oil and grease have approached the 15/10 mg/L limit since 2002, reaching levels of 9.5 mg/L as a monthly average and 14 mg/L as a daily maximum. In light of these three factors, backsliding from the minimum 15/10 mg/L limitation in the 2002 Permit is unjustified. An effluent limitation for oil and grease must be included in the Permit. A similar correction of the analysis must be done for each relaxed effluent limitation, and effluent limits must be established in the Permit.

IV. The Permit inappropriately creates loopholes, complicating compliance determinations and enforcement

In direct contradiction to the stated Cal/EPA goal of improving "clarity" of what constitutes compliance with permits and removing barriers to enforcement, the Permit creates overly complicated requirements that will limit the Regional Board's (and citizen's) ability to enforce the Permit. *See Strengthening Environmental Enforcement in California*, California Environmental Protection Agency (November 14, 2007) available at <http://www.calepa.ca.gov/Enforcement/documents/2007/InUpdate.pdf>; *see also* Governor Arnold Schwarzenegger's *Action Plan for California's Environment* (Oct. 2003), *Enforcement Initiative Memorandum*, Secretary Terry Tamminen, Cal EPA to Board Chairs, Department Directors, and Executive Officers (November 30, 2004); Memorandum from Secretary Alan Lloyd, Cal EPA to Art Baggett, Chair, SWRCB, (March 23, 2005). Two examples of limitations on enforcement demonstrate how the Permit will make the Regional Board's (and interested citizens) job of ensuring compliance with the Permit more difficult and undermine achievement of the Permit's goals.

First, the prohibition of only those by-passes or overflows of waste that reach surface waters unnecessarily complicates the Permit. By imposing the additional requirement that a by-pass or overflow reach surface waters, the Regional Board is setting itself up for difficult determinations regarding violations, as well as arguments from the City to avoid liability. The

outfall and it must be within the numeric limits set forth in Section VI.C.5.f. This is an effluent limitation and it is consistent with the effluent limitation for turbidity in the 2002 Permit.

prohibition on by-passes or overflows is sound no matter where they end up, and it furthers the purpose of protecting water quality whether the operational failure results in waste reaching surface waters or not. At a minimum the Regional Board should follow the lead of other regional boards and prohibit discharges to storm drains or surface waters.² *See e.g.*, San Francisco Regional Board, Order No. 01-143 (City of Millbrae Wastewater Treatment Plant Permit). A better solution would be to modify Section III.B. to prohibit the by-pass or overflow of waste, regardless of the destination. Such a provision would demand better and more effective management of the RWCF and collection system, and thus improve protection of water quality, while also making the Permit easier to enforce in the event of a misstep.

Second, by excluding several provisions of the Permit from the enforcement remedies of the Clean Water Act, the Regional Board has diluted the deterrent aspect of the Permit provisions, and thus weakened the overall effectiveness of the Permit in protecting water quality. The enforcement remedies under the Clean Water Act are more severe than those under State law. Further, citizens may enforce the Clean Water Act, so specifically identifying certain provisions as not imposed under the Clean Water Act may eliminate a citizen's ability to enforce these provisions. Considering that Regional Board staff is already overextended, limiting the ability of citizens to enforce permit provisions designed to ensure protection of water quality is contrary to the Regional Board's mission and the goal of this Permit.

The law specifically requires NPDES permits to include terms more stringent than the minimum required by the Clean Water Act when those provisions are necessary to implement water quality control plans, to protect beneficial uses, or to prevent nuisance. Cal. Water Code § 13377. The law does not exempt these provisions from the enforcement remedies available under the Clean Water Act. The loophole in enforcement created by the Regional Board's exemption is not supported by law. The groundwater limitations are integral to protecting water quality throughout the region, including specifically protecting the beneficial uses of area groundwater, as well as protecting groundwater that may be hydrologically connected to the San Joaquin River and thus capable of providing a conduit for pollutants from the RWCF treatment system to the river.³ Likewise, the operation and maintenance of the treatment ponds, *see* Permit § VI.C.4.a., will impact water quality by, among other things, ensuring that enough freeboard is available to capture the inflow and infiltration to the system from a large storm and prevent a by-pass. It is therefore incorrect to claim that these provisions solely implement State law. By excluding these provisions from the enforcement remedies of the Clean Water Act, the Regional Board illegally limits the enforceability of the Permit, and thus *creates rather than removes* a

² CSPA is not asserting that a storm drain is not a water of the State or water of the United States. Rather, CSPA is articulating that by including the term "storm drain" in Section III.B. the Regional Board would more effectively deter by-passes and overflows of waste from the RWCF and collection system by precluding any argument on the issue from the discharger. Such a requirement would clearly be consistent with protecting waters of the state since a by-pass or overflow that reaches a storm drain will impact receiving waters indirectly if not directly.

³ Further, if these waters are hydrologically-connected, then discharges of pollutants to these waters can only be permitted with an NPDES permit. In such a case, allowing discharges to groundwater under Section V.B. but exempting violations of Section V.B from enforcement remedies of the Clean Water Act is illegal.

barrier to enforceability. As a result, the Permit will fail to efficiently and effectively protect water quality as required.

V. Conclusion

CSPA thanks the Board and staff for its time and effort developing this Permit. Our comments are presented here and in our submission of 7 September 2008. These comments raise significant issues that must be addressed prior to adoption of the Permit. We encourage you to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Jennings", with a stylized, cursive script.

Bill Jennings, Executive Director
California Sportfishing Protection Alliance